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In The

Supreme Court of the United States

October Term, 1992

UNITED STATES OF AMERICA, *ex rel.*
THE PRECISION COMPANY,

Petitioner,

vs.

KOCH INDUSTRIES, INC., *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals correctly hold that, to establish subject matter jurisdiction under 31 U.S.C. § 3730(e)(4) in a False Claims Act *qui tam* action, petitioner must qualify as an "original source" as defined in 31 U.S.C. § 3730(e)(4)(B), because petitioner's action was based at least in part on prior public disclosures?

2. Did the Court of Appeals correctly hold that petitioner failed to qualify as an "original source" under 31 U.S.C. § 3730(e)(4)(B) because it did not have "direct and independent knowledge" of the information on which the allegations were based?

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Petitioner, The Precision Company, sued respondents, Koch Industries, Inc., and its subsidiaries, under the *qui tam* provisions of the False Claims Act, 31 U.S.C. § 3730, and accused respondents of underreporting the amounts of oil and natural gas they purchased from Federal and Indian lands by deliberate practices of fraudulent measurement. The United States District Court for the Northern District of Oklahoma dismissed the action under 31 U.S.C. § 3730(e)(4) for want of subject matter jurisdiction. The United States Court of Appeals for the Tenth Circuit affirmed the district court's dismissal.

United States ex rel. Precision Co. v. Koch Industries, Inc., 971 F.2d 548 (10th Cir. 1992) (Appendix A to the Petition for Certiorari).

Petitioner's omission of significant facts, and its erroneous reliance on a nonexistent conflict among the circuits, requires a statement of the background to this case and the proceedings below.

I. The Parties and Their Relationships

Respondent Koch Industries, Inc., is a privately-held corporation whose business includes the purchase and transportation of oil and gas; each of the other respondents is a subsidiary or division of Koch Industries, Inc. Nearly all of respondents' oil and gas purchases (including their purchases of oil and gas produced from Federal and Indian lands) are made from the entities who operate the producing properties; those unrelated producers include large integrated companies, such as Exxon, as well as smaller independent producers. Two brothers, Charles Koch and David Koch, are the majority shareholders in Koch Industries, Inc., and are actively involved in the management of the company.

Petitioner, The Precision Company, was incorporated in June 1988 by William Koch, David Koch's twin brother and a former officer, director, and major shareholder in Koch Industries. William Koch was removed from the management of Koch Industries in late 1980 after he failed in an attempt to seize control of the company, and his shares in the company (or shares owned by entities he controlled) were repurchased by Koch Industries in 1983

for 475 million dollars cash. Since selling his interest in Koch Industries, William Koch and entities he controls have filed claims against or involving his brothers and Koch Industries no fewer than seven times, thus far without success.[1] William Koch formed petitioner as a front for further litigation against respondents over allegations he had previously made in other litigation. Although petitioner Precision originally had three stockholders, at the time the instant action was filed its stockholders were William Koch, who owned 75% of petitioner's stock, and William Presley, who owned the remaining 25% and was petitioner's President.

II. The Prior Public Disclosures About Respondents' Alleged Mismeasurement Practices

Before this action was filed on May 25, 1989, charges that respondents were allegedly engaged in fraudulent

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[1] The six cases besides the present one are *Koch v. Koch Industries, Inc.*, No. 85-1636-C (D. Kan.), *mandamus denied*, No. 87-1689 (10th Cir., June 24, 1987), later opinion 127 F.R.D. 206 (D. Kan. 1989) (still pending in U. S. District Court); *Oxbow Energy, Inc. v. Koch Industries, Inc.*, 686 F. Supp. 278 (D. Kan. 1988) (dismissing case), *aff'd*, No. 88-2300 (10th Cir., Jan. 5, 1990); *Koch v. Koch*, No. 88-1320-K (D. Kan. Nov. 4, 1990), *aff'd*, 903 F.2d 1333 (10th Cir. 1990); *Koch v. Koch*, No. 88-C-1782 (Kan. 18th Dist. Ct., decided May 30, 1989), *aff'd mem.*, 791 P.2d 753 (Kan. App. 1990); *In re Estate of Koch*, No. 90-P-1491 (Kan. 18th Dist. Ct., decided Dec. 31, 1991) (appeal pending before the Kansas Court of Appeals), and *U.S. ex rel. Precision Co. v. Koch Industries, Inc.*, No. 91-C-763-B (N.D. Okla., filed Sept. 30, 1991, dismissed for lack of subject matter jurisdiction Dec. 11, 1992, notice of appeal filed Jan. 8, 1993). This last case is another False Claims *qui tam* action in which petitioner and its shareholders have unsuccessfully attempted to "cure" the jurisdictional defects in the present lawsuit.

mismeasurement of oil and gas produced from Federal and Indian lands were raised in public hearings conducted by a Committee of the United States Senate on May 9, 1989. During the Senate hearings, both documentary and testimonial information relating to the allegations was disclosed. Some of that information was assembled in earlier investigations conducted by William Koch and William Presley, and some was obtained by the Committee from other sources, including a subpoena directed to Koch Industries. The allegations from the Senate Committee hearing received widespread publicity in the news media.[2]

Completely unmentioned in the Petition for Certiorari is the fact that virtually identical public allegations of wrongdoing had surfaced earlier, before petitioner had even come into existence. *See* 971 F.2d at 553-54. Those earlier allegations were raised by William Koch and entities he controls, well before the present case was filed, in *three* lawsuits filed in the United States District Court for the District of Kansas.[3]

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[2] Later news media reports of the allegations occurred when the Bureau of Land Management and the Osage Tribal Council announced that their investigations had found no support for the allegations made in the Senate Committee hearings, and when the United States Attorney in Oklahoma City announced that a federal grand jury investigation into respondents' alleged mismeasurement had been terminated with no indictments expected.

[3] Those allegations *first* appeared in Amendments to the Complaint in *Oxbow Energy, Inc. v. Koch Industries, Inc.*, No. 87-2436-S, filed Aug. 26, 1987, dismissed 686 F. Supp. 278 (D. Kan. 1988), *aff'd* No. 88-2300 (10th Cir. Jan. 5, 1990), and are virtually word-for-word identical to those pleaded in this case: the only

III. The Proceedings Below

Petitioner filed the complaint in this action, under seal, on May 25, 1989, but the complaint was only unsealed and served on respondents on March 5, 1990, after the United States, having conducted its own extensive investigation of the allegations, declined to intervene. Respondents moved to dismiss the complaint for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4)(A) because

> (1) the action was based upon allegations of wrongdoing that had already been disclosed in Congressional hearings, in the news media, and in three prior lawsuits, and was therefore barred unless petitioner could qualify as an "original source" as defined in 31 U.S.C. § 3730(e)(4)(B); and
>
> (2) petitioner could not qualify as an "original source" since
>
> > (a) petitioner was a corporation, rather than an individual, as the statute requires;
> >
> > (b) petitioner had withheld much of its information about respondents' alleged wrongdoing, instead of providing that

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significant difference is that the earlier allegations are not limited to oil and gas purchased from Federal and Indian lands. The same allegations were repeated by William Koch in pleadings filed July 29, 1988 in a *second* lawsuit, *Koch v. Koch*, No. 88-1320-K (D. Kan., filed June 17, 1988), but rejected by the district court (Nov. 4, 1988), *aff'd* 903 F.2d 1333 (10th Cir. 1990), and then raised yet a third time in a proposed Second Amended Complaint, filed in November 1988, that was disallowed as untimely and in bad faith in *a third* lawsuit, *Koch v. Koch Industries*, 127 F.R.D. 206 (D. Kan. 1989).

> information to the government before suit, as the statute requires; and
>
> (c) petitioner's information about respondents' alleged wrongdoing was not "direct and independent" as the statute requires, because petitioner, as a corporation,
>
> > (i) could act only through human intermediaries and was therefore inherently capable only of indirect and derivative knowledge, and
> >
> > (ii) because petitioner's information was compiled before petitioner's incorporation through lengthy chains of hearsay and multiple intermediaries.

In advisory findings and recommendations, the United States Magistrate, Jeffrey Wolfe, found as a fact that petitioner's lawsuit was based *both* upon nonpublic information acquired by petitioner, *and* on information made public in the Senate Committee hearings and in the course of William Koch's prior lawsuits against respondents:

> [T]he Magistrate finds that Plaintiff's suit (filed May 25th, 1989) is based both upon facts and witnesses discovered prior to, and following the Senate disclosures. The Magistrate also finds that the action incorporates, to a degree, some of the disclosures made public at the Senate hearings.

Appendix C to the Petition for Certiorari, at A-18 to -19. The Magistrate then incorrectly interpreted the jurisdictional bar of § 3730(e)(4), which divests courts of jurisdiction over lawsuits "based upon" such public disclosures unless the relator qualifies as an "original source," as

applying only to lawsuits based *solely* upon the public disclosure; reasoning that "[Petitioner] may rely in part on public disclosures and still supply facts from its own investigation to support its case," the Magistrate recommended that petitioner's lawsuit not be dismissed. *See* Appendix C to the Petition for Certiorari, at A-22.

On review of the Magistrate's recommendation, Judge H. Dale Cook (N.D. Okla.) specifically found that the key factual element in the record was undisputed:

> The Magistrate found, and the parties do not dispute, that the first count of the Complaint is (at least in part) based upon publicly disclosed allegations or transactions. In [respondents'] words: "Thus, the question is squarely presented – may a plaintiff maintain a qui tam action if it is based only *partly* on public disclosures?

Appendix D to the Petition for Certiorari, at A-26 (emphasis in original).

Judge Cook correctly concluded that section 3730(e)(4)(A) does not apply only to lawsuits based "solely" on public disclosures:

> Engrafting the word "solely" onto the statute does not represent a minor judicial gloss. It dramatically expands federal jurisdiction in this area. Clearly, Congress knew how to draft such language if it wished to do so. . . . Statutes conferring jurisdiction on federal courts are to be strictly construed, and doubts resolved against federal jurisdiction. . . . As a matter of textual interpretation, the Court concludes that a *qui tam* action based in any degree on public

> disclosures requires a court to proceed to "original source" analysis.

Id. at A-28.

Judge Cook further held that petitioner did not qualify as an original source and specifically found that petitioner had not provided the government with all its information about respondents' alleged wrongdoing before filing suit. *Id.* at A-29 to -31. Judge Cook accordingly dismissed the action for want of subject matter jurisdiction.

Petitioner then sought review in the Court of Appeals for the Tenth Circuit. On appeal, petitioner reasserted its view that § 3730(e)(4) applied only to actions based "solely" upon public disclosures, while respondents relied on Judge Cook's interpretation that the jurisdictional bar applies to actions "based in any degree upon public disclosures." In a published opinion filed July 27, 1992, 971 F.2d 548, a unanimous panel of the Court of Appeals for the Tenth Circuit affirmed Judge Cook's order of dismissal, holding that "a plaintiff whose *qui tam* action is based in any part upon publicly disclosed allegations or transactions is subject to the 'original source' jurisdictional requirement" *id.* at 553, and that because "[t]he record before us leaves no doubt [petitioner's] complaint is 'based upon' publicly disclosed allegations . . . [petitioner] must therefore qualify as an original source in order to proceed with its claim." *Id.* at 554.

The Court of Appeals also held that petitioner could not qualify as an "original source" under section

3730(e)(4)(B). The Court's review of the record demonstrated that with unimportant exceptions, described as "weak, informal, and strikingly redundant," 971 F.2d at 554, all of the information on which petitioner's allegations against respondents are based was gathered by others *before* petitioner came into existence, and that petitioner "cannot seriously argue it qualifies as an original source" of the information whose compilation (and at least partial public disclosure) predated petitioner's existence. The Court therefore affirmed the district court's dismissal of petitioner's action for want of subject matter jurisdiction.

REASONS WHY THE WRIT SHOULD BE DENIED

I. Petitioner's Current Argument That This Action Is Not "Based Upon" Public Disclosures is Contrary To The Uncontested Factual Findings Of The District Court And Distorts The Holding Of The Court Of Appeals

The district court and the Court of Appeals both recognized that petitioner did not dispute that its action was at least partly "based upon" public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A), and that the jurisdictional question turned on whether "based upon" means "based *solely* upon," as argued by petitioner. The Court of Appeals squarely rejected petitioner's interpretation as incompatible with ordinary usage of the express statutory terms:

> At the threshold, the plain unambiguous language of § 3730(e)(4)(A) states a *qui tam*

> action may be barred only if the action is "based upon" the public disclosure of "allegations or transactions." [Petitioner] would have us read this provision to apply only to actions based "solely" upon publicly disclosed information. We cannot countenance [Petitioner's] interpretation.
>
> As a matter of common usage, the phrase "based upon" is properly understood to mean "supported by." In this context, an FCA *qui tam* action even partly based upon publicly disclosed allegations or transactions is nonetheless "based upon" such allegations or transactions. Congress chose not to insert the adverb "solely," and we cannot, because to do so would dramatically alter the statute's plain meaning.

971 F.2d at 552. The Court of Appeals likewise concluded that respondents' "restrictive interpretation" was more consistent with the principle that jurisdictional statutes are to be strictly construed, reasoning that under petitioner's interpretation "with a little artful pleading, all *qui tam* plaintiffs could pass the jurisdictional threshold by fashioning complaints only 'partly based' upon publicly disclosed allegations or transactions." *Id.* And the Court of Appeals further reasoned that in light of the purpose of § 3730(e)(4) "Congress never intended a *qui tam* plaintiff to benefit in whole or in part upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute." *Id.* at 552-53 (emphasis in original).

In its Petition for Certiorari, however, petitioner seeks to distort the decision of the Tenth Circuit in order to create the false impression of a conflict among the

circuits. Seizing upon the single sentence that equates "based upon" with the words "supported by," petitioner argues that the Court of Appeals' "strained reading" of the statute would bar "an action that is derived solely from original information . . . simply because allegations similar to those uncovered by the *qui tam* plaintiff are disclosed publicly before the case is filed." Petition for Certiorari at 10. But the Court of Appeals simply did *not* rule that some causal connection between the public disclosures and the *qui tam* action was unnecessary.[4] Instead, the Court of Appeals' opinion analyzes the single issue of whether the statutory "original source" requirement can be avoided if the *qui tam* action is only partly based upon the public disclosure. The existence of a causal connection is an implicit premise of that analysis: the analysis would have been unnecessary had the Court of Appeals intended to rule that any public disclosure at all triggered the "original source" requirement. Indeed, the Tenth Circuit's recognition of a causal connection between the public disclosures and the *qui tam* allegations is explicit in its conclusion that "Congress never intended a *qui tam* plaintiff *to benefit in whole or in part* upon publicly disclosed allegations or transactions *unless* that plaintiff can demonstrate he was an original source as defined by statute." 971 F.2d at 553 (emphasis added).[5]

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[4] The Court of Appeals was obviously correct in observing that an action "based upon" a public disclosure can also be said to be "supported by" that public disclosure. This, however, is a far cry from saying that there need not be any causal connection between the action and the public disclosure.

[5] Although the Tenth Circuit did *not* give the statute the restrictive interpretation adopted in *United States ex rel. John Doe*

Moreover, there was no reason for the Tenth Circuit to decide whether the statute requires a causal connection between the public disclosures and the *qui tam* action, because the findings of fact in this case, which were undisputed by petitioner, clearly establish such a causal connection. Thus the Magistrate, although accepting petitioner's argument that the statutory phrase "based upon" means "based solely upon," nonetheless expressly found that petitioner's action was in part based on "some of the disclosures made public at the Senate hearings," as well as on evidentiary affidavits publicly disclosed in a prior William Koch lawsuit against respondents.[6] Appendix C at A-18. On review, the district court found, without contradiction from petitioner, that "the parties do not dispute . . . that [Petitioner's action] is (at least in part) based upon publicly disclosed allegations or transactions." These factual findings went uncontested in the

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v. John Doe Corp., 960 F.2d 318 (2d Cir. 1992), such an interpretation does *not* bar all actions "derived solely from original information, or from an independent investigation," as petitioner argues, Petition for Certiorari at 10, but merely requires the relator to qualify as a statutory "original source." *See Doe*, 960 F.2d at 322 n.3.

[6] Significantly, until the Senate Committee Hearing, petitioner had no information concerning measurement of production from Federal or Indian lands, and had no access to respondents' internal "over and short" statistics, which were subpoenaed by the Committee. See Applee. Supp. App. at 92-168; Brief of Appellees at 17 & n.10. Petitioner had counsel present at the Committee Hearing, and filed its *qui tam* suit within two weeks of the hearing; petitioner also included a transcript of the hearing in its submission to the government of information on which its suit was ostensibly based. *See* Petition for Certiorari at 6.

Court of Appeals, where petitioner again argued that only a lawsuit based "solely" on public disclosures was subject to section 3730(e)(4)'s jurisdictional bar:

> [Respondents] challenged the trial court's subject matter jurisdiction by producing *evidence* establishing [petitioner's] complaint was based, at least in part, upon publicly disclosed information. The trial court ruled a *qui tam* plaintiff whose complaint is based in any degree upon publicly disclosed information must demonstrate it was an original source as defined by statute.

971 F.2d at 551 (emphasis added).

Thus while petitioner now would have this Court believe that the record shows that petitioner's lawsuit was "[i]n no meaningful sense" based upon public disclosures, Petition for Certiorari at 12, and that there is no causal connection between petitioner's lawsuits and the prior public disclosures, *id.* at 11 & n.3, those propositions have been found to be untrue. Petitioner is actually asking this Court to evaluate an argument unmentioned in the Court of Appeals' decision, and to revisit district court factual findings that went entirely uncontested below.

II. The Supposed Conflict Among the Courts of Appeals Does Not Exist

Petitioner asserts that the Tenth Circuit's holding that this lawsuit was "based upon" prior public disclosures within the meaning of 31 U.S.C. § 3730(e)(4)(A) is in conflict with decisions of three other Courts of Appeals:

United States ex rel. LeBlanc v. Raytheon Co., 913 F.2d 17, 20 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149, 1159-60 (3d Cir. 1991); and *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1500 n.12 (11th Cir. 1991). In truth, however, *none* of those three opinions conflicts with the Tenth Circuit's holding.[7]

Williams was a False Claims Act *qui tam* lawsuit brought by an attorney who became aware of bid-rigging on government contracts in the course of his employment by the government. The district court granted *the government's* motion to dismiss the claim for lack of subject matter jurisdiction. On appeal to the Eleventh Circuit, the central issue was the government's assertion that *no* government employee could qualify as a *qui tam* relator with respect to information acquired in the course of his employment. The government's novel theory was that a "public disclosure" occurs any time a government employee acquires information in his official capacity, and then "reveals" that information to himself in his private capacity. 931 F.2d at 1499.

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[7] Petitioner never cited *any* of these three cases to the Court of Appeals as support for petitioner's arguments that a False Claims Act *qui tam* action is not "based upon" public disclosure if the relator has at least some information that has not been publicly disclosed. *See* Opening Brief of Appellant; Response Brief of Appellant; Petition for Rehearing. Indeed, in a supplemental letter filed pursuant to Fed. R. App. Proc. 28(j), *respondents* brought the Third Circuit's *Stinson* opinion to the Tenth Circuit's attention as supporting their position (petitioner filed no Rule 28(j) letter).

The Eleventh Circuit Court of Appeals rejected the "dubious logic" of the government's dual status argument, and held that there had been no "public disclosure" within the meaning of section 3730(e)(4)(A). *Id.* at 1499-1500. Having found no public disclosure within the meaning of the statute, the Eleventh Circuit found it unnecessary to decide what the statute means when it refers to an action "based upon" public disclosure, or decide whether the relator could qualify as an "original source" under the statute.

LeBlanc was likewise a *qui tam* False Claims Act case brought by a government employee over fraud that he uncovered in the course of his employment. As in *Williams*, the *government* contested the existence of subject matter jurisdiction under the same "public disclosure" theory advanced in *Williams*, and the district court accepted the government's theory and dismissed the case. The Court of Appeals for the First Circuit rejected the district court's adoption of the government's "dual status" argument, however, and criticized the argument as requiring "the assumption that government employees lead schizophrenic lives, and can publicly disclose information to themselves." 913 F.2d at 20. As in *Williams*, the *LeBlanc* opinion rejects the government's "intrapsychic" theory of "public disclosure," and does not reach the statutory "based upon" language.

Stinson, the third purported "circuit conflict" case cited by petitioner, also focuses on whether particular events constituted "public disclosure" under 31 U.S.C. § 3730(e)(4)(A). The *Stinson* relator had obtained through discovery in an ordinary civil lawsuit information which suggested that the Prudential Insurance Company (not a

party to that lawsuit) had defrauded the government, and therefore filed a False Claims Act *qui tam* lawsuit against Prudential. The district court granted the defendant's motion to dismiss for lack of subject matter jurisdiction, 736 F. Supp. 614 (D.N.J. 1990), and the Third Circuit Court of Appeals affirmed, 944 F.2d 1149 (1991).

The Third Circuit's *Stinson* opinion analyzes whether discovery proceedings in civil litigation constitute a "civil hearing" within the meaning of section 3730(e)(4)(A), 944 F.2d at 1154-57, and whether the critical information was "publicly disclosed" when it was produced in discovery, *id.* at 1157-60. Answering both questions in the affirmative, the court then addresses whether the relator could qualify as an "original source" and concludes it could not, since the relator's knowledge of the alleged wrongdoing was neither "independent" of the public disclosure (the discovery disclosure was concededly the source of the relator's substantive knowledge) nor "direct" (it came through two intermediaries). *Id.* at 1160-61. The *Stinson* court's *entire* discussion of the meaning of the statutory requirement that a jurisdictionally barred action be "based upon" publicly disclosed information is contained in a fragment of a footnoted sentence: "[I]t is plain that [the relator's] *qui tam* action is 'based upon' the allegations or transactions publicly disclosed in a civil hearing." 944 F.2d at 1160 n.9. Indeed, the *Stinson* opinion expressly declines to consider "whether a public disclosure bars a *qui tam* suit by someone who acquires the information independently from the public disclosure, but who does not fit within the stringent definition of an original source." *Id.*

Thus the three decisions on which petitioner relies do not decide the meaning of the phrase "based upon," nor even discuss it in dicta. The purported "Circuit Conflict" that petitioner cites does not exist. Indeed, the *only* Court of Appeals' opinion yet to decide whether an action is "based upon" public disclosure, even if the relator acquired no information from that disclosure, is *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992). *Doe* was a lawsuit brought by a criminal lawyer who learned of the alleged fraud against the government in the course of his representing one of the fraudfeasors, who later was granted immunity and testified in public criminal proceedings brought against others. The relator argued that his *qui tam* lawsuit was not "based upon" the public disclosures during the criminal proceedings, because he had learned about the fraud during his prior representation of the immunized fraudfeasor. The *Doe* court rejected the argument:

> The relator's argument misses the point. The allegations in his [*qui tam*] complaint are the same as those that had been publicly disclosed prior to the filing of the *qui tam* suit. Public disclosure of the allegations divests district courts of jurisdiction over *qui tam* lawsuits regardless of where the relator obtained his information. *See [United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990)] ("[I]f the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff is not a source of that information, then the suit is barred."); *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1367 (D. Mass. 1988) (*qui tam* suit not barred because information in complaint was not

"information that was contained in *any* public disclosure") (emphasis added).

960 F.2d at 324.[8]

III. The Court of Appeals Correctly Held That Under Section 3730(e)(4)(B), Petitioner Cannot Qualify As An "Original Source"

The Court of Appeals' decision that petitioner could not qualify under 31 U.S.C. § 3730(e)(4)(B) as the "original source" of information about respondents' alleged wrongdoing was premised on the fact that essentially all that information had been gathered (and in part publicly disclosed) *before petitioner was formed as a corporation*. This unique factual predicate to the Tenth Circuit opinion has not occurred in any prior False Claims Act case, is unlikely to recur, is obviously correct, and surely is not an issue on which the lower federal courts are in need of guidance.

Nor is it the case that under the ruling below no corporation will ever be able to qualify as a *qui tam* relator, as petitioner argues. In the first place, the "original source" requirement only comes into play where there has been a public disclosure, in which event Congress has mandated that the plaintiff be an individual with direct and independent knowledge. No such requirements exist for any other False Claims Act *qui tam* action. In the

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[8] Dicta in Judge Scirica's dissenting opinion in *Stinson, supra*, arrives at the same conclusion as does *Doe*, 944 F.2d at 1168 n.1, but the *Stinson* majority found it unnecessary to reach the issue and expressly declined to do so, *id.* at 1160 n.9.

second place, when the "original source" requirement is at issue, the Court of Appeals' decision neither states nor implies that human beings cannot convey information about wrongdoing to a corporation, or that corporations cannot be False Claims Act relators, but merely holds that petitioner cannot fairly make a claim to *original source status* with respect to information that predates petitioner's existence. Thus, under the Tenth Circuit's rationale, corporate status is no obstacle in the many cases in which there has been no pre-suit public disclosure as defined in section 3730(e)(4)(A). And although respondents did argue below that a corporation could not qualify as an "original source" under section 3730(e)(4)(B), since that statutory provision explicitly defines an "original source" as "an individual," and since corporations, which only function through human intermediaries, are inherently incapable of the "direct" knowledge that the statute also requires, the Court of Appeals explicitly declined to address these arguments. 971 F.2d at 553 n.4.

CONCLUSION

Petitioner's current jurisdictional theories were not ruled upon by the Court of Appeals, are in direct conflict with the district court's uncontested findings of fact, and have been rejected by the only appellate decision on point. Petitioner's contention that its arguments are supported by decisions in three other circuits, which are said to "conflict" with the Tenth Circuit's supposed interpretation, is simply incorrect: the three "conflicting" cases do not even discuss, much less decide, the issue that petitioner now raises.

Petitioner's argument that the Court of Appeals erred in holding that petitioner was not an "original source" of the information on which its lawsuit was based, and its assertion that this ruling must be revisited to give the lower courts guidance on the proper interpretation of the statutory "original source" provisions, also misconstrues the decision below. The Tenth Circuit's decision that petitioner could not be an "original source" of information gathered by others before petitioner was formed is obviously correct (petitioner does not even argue that there is a conflicting case on point), and is based on unique facts unlikely to recur.

Petitioner has wholly failed to justify its assertion that this Court should review the decision below: the Petition for Certiorari should be denied.

Respectfully submitted,

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